Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

COMMENTS

OF

BELL ATLANTIC

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LINCOLN TELEPHONE

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SBC COMMUNICATIONS

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SUMMARY

Reduced regulation, including freedom from local franchise and any Title II or Title II-like regulation, is the only incentive for deploying open video systems. The market and available technology, which are better suited to cable systems, substantially limit the potential for open video systems to succeed under even the most flexible regulatory regime. Open video systems can succeed only under regulation that acknowledges and adapts to the economic realities of the existing multichannel video programming distribution market and the operational realities of available technologies for the delivery of multichannel video programming services.

If the Commission's regulation of open video systems does not result in a lesser burden (in terms of both regulatory process and operational requirements) than local franchise regulation, potential open video system operators will have no incentive to forego the editorial control they can exercise as cable operators or to expend the extra resources necessary to deploy and operate systems that accommodate multiple video programming providers. Likewise, if the Commission permits local authorities to exercise jurisdiction over the use of public rights-of-way by open video systems in a manner that makes elimination of the franchise requirement illusory, any incentive to deploy open video systems will be eliminated.

There is a single test by which the Commission must evaluate proposed open video system rules: Will these rules make open video systems an

attractive alternative for cable operators? If this question can be answered affirmatively, such rules also will make open video systems an attractive alternative for telephone companies entering the cable business.

For open video systems to become a viable business alternative to cable systems, the Commission must minimize rules and maximize business flexibility for open video system operators. It must adopt only those regulations that are absolutely necessary to comply with Section 653. The Commission must not attempt to codify a rule for every conceivable situation, but should leave the details to negotiations between operators and video programming providers and, if necessary, the dispute resolution process, where it can decide disputed issues on the basis of fact.

The single most important factor in determining whether regulation will encourage or discourage open video systems is how the Commission approaches discrimination issues. The Commission should recognize that there are many valid business reasons for treating video programming providers differently with respect to the rates, terms, and conditions for carriage. Differences based on legitimate business considerations should not be regarded as "unjustly or unreasonably discriminatory." The Commission should not attempt to second-guess the good faith business judgment of operators. Instead, the Commission should allow varied business arrangements with programming providers unless a complaining provider makes, and the operator cannot rebut, the following *prima facie* discrimination showing:

(1) that the operator intentionally treated it substantially differently than similarly situated video programming providers;

(2) that such discriminatory treatment was commercially unreasonable in the video programming business; and

(3) that the complainant suffered actual and substantial commercial harm from such discrimination.

Open video systems will be entering markets in which there are well-established customer expectations. Open video systems will not succeed if operators are restrained by regulation from meeting those expectations. Therefore, operators must be permitted to structure their business arrangements with video programming providers to ensure that their systems offer customers the services they expect. In particular, open video system operators must be given enough flexibility to ensure that their systems offer programming packages that can compete effectively with what incumbent cable operators and other multichannel video programming distributors ("MVPDs") offer. The Commission's primary focus should be on enabling open video systems to be viable competitors against existing cable systems and other MVPDs.

The Commission should not, therefore, adopt detailed rules prescribing open video system requirements unless specifically mandated by Section 653. Under this approach, the Commission would adopt a rule that simply prohibits an open video system operator from discriminating against unaffiliated video programming providers and would leave the details of the operation of open

video systems to the good faith business judgment of the operators, who would at all times be subject to the filing of complaints by parties who believe they have been denied carriage in violation of Section 653 and the Commission's rules or that they have been subjected to unjust, unreasonable, or unreasonably discriminatory prices, terms, or conditions. Similarly, the Commission would adopt a simple rule concerning PEG access and would rely on the dispute resolution process as the mechanism for ensuring that operators provide PEG access that complies with Section 653.

The certification process should be streamlined to assure that it cannot be used by incumbent cable operators to delay or burden the entry of open video system operators. Any precertification compliance requirements would be inconsistent with the congressional mandate that the Commission act to approve or disapprove certifications within 10 days.

The surest way for the Commission to encourage the deployment on a reasonable and timely basis of open video systems and other advanced telecommunications capabilities is to adopt the flexible, pro-competitive rules and the dispute resolution process proposed herein. By making operation of open video systems a genuinely attractive alternative to operation of cable systems, the Commission can encourage the competitive entry and investment that Congress intended and that will bring the benefits of competition to American consumers.

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COMMENTS

The undersigned Joint Parties[1] submit these comments in response to the *Notice Of Proposed Rulemaking* (FCC 96-99), released on March 11, 1996 ("Notice").

Introduction

1. The Telecommunications Act of 1996

The Telecommunications Act of 1996 ("1996 Act")[2] repeals the restriction on telephone company provision of video programming services that previously had been codified in the Communications Act of 1934, as amended ("Communications Act").[3] Section 302(a) of the 1996 Act also sets forth a new regulatory approach for the provision of video programming by telephone companies by providing for the codification of new Sections 651-653 as a part of

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[1] Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; SBC Communications Inc. and Southwestern Bell Telephone Company.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, enacted February 8, 1996 ("1996 Act").

[3] Communications Act of 1934, 47 U.S.C. § 151 *et seq.* Section 302(b)(1) of the 1996 Act repealed Section 613(b) of the Communications Act, which had provided for the "cable-telephone company cross ownership restriction."

Title VI of the Communications Act. New Section 651 provides several alternative ways a telephone company may enter the video programming marketplace, including (1) through radio-based systems under Title III of the Communications Act,[4] (2) on a common carrier basis under Title II of the Communications Act,[5] (3) as a cable system under Title VI of the Communications Act,[6] or (4) by means of an "open video system" under new Section 653 of the Communications Act.[7] To the extent permitted by the Commission, a cable operator or any other person may also provide video programming through an open video system.[8]

The Commission initiated this rulemaking proceeding in accordance with new Subsections 653(b) and (c), which provide for Commission actions necessary to implement a regulatory framework for open video systems. In the Notice, the Commission stated its intention to "implement the requirements of the open video system framework in a way that will promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[9]

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[4] 1996 Act § 651(a)(1).

[5] Id. § 651(a)(2).

[6] Id. § 651(a)(3).

[7] Id. § 651(a)(3)-(4).

[8] Id. § 653(a)(1).

[9] Notice, ¶4, quoting the Joint Explanatory Statement of the Committee of Conference ("Conference Report") at 172, 177-178.

2. The Congressional Goal

The goal of Congress in adopting Section 653 of the 1996 Act was to "encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets." [10] Congress recognized "that common carriers that deploy open systems will be 'new' entrants in established markets and deserve lighter regulatory burdens to level the playing field" and that "the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced." [11]

3. Achieving The Congressional Goal

Reduced regulation is the only incentive for deploying open video systems. The market and technology substantially limit the potential for open video systems to succeed under even the most flexible regulatory regime. The market and the available technology are better suited to cable systems, over which operators exercise substantially greater editorial control than open video system operators will be permitted. Open video systems can succeed only under regulation that acknowledges and adapts to the economic realities of the existing multichannel video programming distribution market and the operational realities of available technologies for the delivery of multichannel video programming services. The discredited video dialtone rules ignored these realities.

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[10] Conference Report at 178.

[11] Id.

Aware of the video dialtone experience, Congress repeatedly expressed its intent that neither Title II regulation nor Title II-like regulation be imposed on open video systems. Section 653(c)(3) states, "With respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of title II." As if to underscore this intent, Section 302(b)(3) took the extraordinary step of terminating the Commission's video dialtone regulations. Finally, the legislative history states:

> The conferees do not intend that the Commission impose title II-like regulation under the authority of this section.
>
> Rules and regulations adopted by the Commission pursuant to its jurisdiction under title II should not be merged with or added to the rules and regulations governing open video systems, which will be subject to new section 653, not title II. Section 302(b)(3) of the conference agreement specifically repeals the Commission's video dialtone rules. Those rules implemented a rigid common carrier regime, including the Commission's customer premises equipment and *Computer III* rules, and thereby created substantial obstacles to the actual operation of open video systems.[12]

Open video system operators must cede editorial control over up to two-thirds of the activated channels on their systems to other video programming providers if demand exceeds capacity. In return, they will be subject to less Title VI and local regulation than cable system operators.[13] The only reduction in Title VI regulation that is of any substantial value, however, is elimination of the local cable franchise requirement and attendant local regulation. Substantial

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[12] Id. at 177-178.

[13] 1996 Act § 653(c).

Title VI burdens, including the equivalent of franchise fees, will apply to open video system operators. Thus, if the Commission's regulation of open video systems does not result in a lesser burden (in terms of both regulatory process and operational requirements) than local franchise regulation, potential open video system operators will have no reason to forego the editorial control they can exercise as cable operators or to expend the extra resources necessary to deploy and operate systems that accommodate multiple video programming providers. Likewise, if the Commission permits local authorities to exercise jurisdiction over the use of public rights-of-way by open video systems in a manner that makes elimination of the franchise requirement illusory, any incentive to deploy open video systems will be eliminated. In either case, the congressional goal will not be achieved.

4. The Litmus Test

There is a single test by which the Commission must evaluate every aspect of proposed open video system rules: Will these rules make open video systems an attractive alternative for cable operators? If this question can be answered affirmatively, such rules also will make open video systems an attractive alternative for telephone companies entering the cable business. Further, to provide a continuing test of whether the open video system rules do in fact make operating an open video system an attractive alternative to operating a cable system (as well as to ensure that all firms have the same

business options), the Commission must adopt rules that enable incumbent cable operators to elect the open video system option.

Discussion

I. General Approach

The Commission requests comment concerning "what regulations the Commission should adopt to ensure that the open video system operator allocates capacity on a non-discriminatory basis."[14] The Commission then sets out two alternative approaches to that regulation: (1) to adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated video programming providers in its allocation of capacity, with complaints alleging discrimination being heard on a case-by-case basis;[15] or (2) to adopt regulations addressing specific issues that may arise in connection with the allocation of channels.[16] The Joint Parties unequivocally support the first approach.

For open video systems to have any chance as a business alternative to cable systems, the Commission must minimize rules and maximize business flexibility for open video system operators. It must adopt only those regulations that are absolutely necessary to comply with Section 653, namely, rules that prohibit operators from unreasonable or unjust discrimination against other video

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[14] Notice ¶12.

[15] Id.

[16] Id. ¶13.

programming providers. The rules must afford to open video system operators the greatest flexibility permitted by Section 653.

The Commission must not attempt to codify a rule for every conceivable situation, but should leave the details to negotiations between operators and video programming providers and, if necessary, the dispute resolution process, where it can decide disputed issues on the basis of fact, not hypothesis. This flexible approach will increase the prospects for open video system deployment and will fully protect the interests of video programming providers. The time involved in the 180-day dispute resolution process is far less harmful to prospective video programming providers' interests than inflexible rules that are certain to discourage and substantially delay deployment of open video systems.

At this stage, the Commission should clearly articulate the overall approach it will take to resolving disputes. In particular, the Commission should establish specific presumptions and burdens of proof that will apply in complaint proceedings. These presumptions and burdens of proof should afford significant weight to the good faith business judgment of open video system operators and to voluntarily negotiated arrangements. The Commission also should exemplify factors it will consider relevant to whether an operator has provided carriage in a nondiscriminatory manner, whether its prices, terms, and conditions for carriage are just and reasonable and not unreasonably discriminatory, and whether it otherwise has complied with Section 653. These examples should reflect the full range of legitimate business factors and should avoid interference with

voluntarily negotiated terms and conditions between operators and unaffiliated video programming providers.

Accordingly, the Appendix sets forth the open video system rules that the Joint Parties propose. The Appendix also proposes notes the Commission should publish with its rules to provide guidance regarding how the Commission will interpret and enforce its rules. Although open video systems rules could logically fit within the Commission's rules for Cable Television Service,[17] the Joint Parties propose a separate part to make clear which rules apply to cable systems and which to open video systems.

II. Approach To Discrimination Issues

The single most important factor in determining whether regulation will encourage or discourage open video systems is how the Commission approaches discrimination issues. The Commission should recognize that there are many valid business reasons for treating video programming providers differently with respect to the rates, terms, and conditions for carriage. Section 653 prohibits differences in such arrangements only if they are "unjustly or unreasonably discriminatory." The Commission's enforcement should focus on the statutory language and should not attempt to second-guess the good faith business judgment of operators. Instead, the Commission should allow varied business arrangements with programming providers unless a complaining

[17] 47 C.F.R. Part 76.

provider makes the *prima facie* discrimination showing set forth below and the operator cannot rebut the showing.

The Commission should clearly enunciate factors it will deem relevant to whether differentiated treatment of video programming providers is reasonable and just. Those factors should not be limited to differences in function or cost. The justness and reasonableness of differences in the treatment of different video programming providers should be assessed based on factors relevant to the multichannel video programming distribution business. For example, the Commission should regard such matters as the need to compete with incumbent cable operators, the nature and market value of the programming, customary practices in the industry, customers' expectations, demand, and technical limitations of available and affordable technologies as relevant to whether a practice is reasonable.

Open video systems will be entering markets in which there already are well-established ways of doing business. For example, some video programming providers are paid by cable operators, some pay cable operators for carriage, and some split revenues with cable operators. Such compensation arrangements reflect the value of carriage to the video programming provider as well as the value of the programming to customers. Open video systems will not succeed if operators must force video programming providers to accept unfamiliar or undesired business arrangements. The Commission should afford open video system operators sufficient latitude to establish relationships with

video programming providers that are consistent with common business practices in the industry, as well as to offer new arrangements that may be created in response to the competitive market for video programming delivery. The Commission should not regard differing arrangements and their varied application to programming providers as unreasonably discriminatory. Nor should the Commission regard differences in the effects of reasonable business practices on video programming providers as unreasonable discrimination.

Finally, the Commission should presume that an open video system operator's treatment of video programming providers is just and reasonable unless a complaining provider can make the following *prima facie* discrimination showing:

(1) that the operator intentionally treated it substantially differently than similarly situated video programming providers;

(2) that such discriminatory treatment was commercially unreasonable in the video programming business; and

(3) that the complainant suffered actual and substantial commercial harm from such discrimination.

Operators should not be required to defend their practices in the absence of substantial evidence in support of each of these elements.

III. Open Video System Requirements

A. Carriage of Video Programming Providers[18]

Open video systems will be entering markets in which there are well-established customer expectations. Open video systems will not succeed if operators are restrained by regulation from meeting those expectations. Therefore, operators must be permitted to structure their business arrangements with video programming providers to ensure that their systems offer customers the services they expect. In particular, open video system operators must be given enough flexibility to ensure that their systems offer programming packages that can compete effectively with what incumbent cable operators and other multichannel video programming distributors ("MVPDs") offer.

Accordingly, the Commission's primary focus should be on enabling open video systems to be viable competitors against existing cable systems and other MVPDs. The Commission finds in Section 653, however, a goal of intra-system competition to be balanced with inter-system competition. The availability of a substantial portion of an open video system to programming selection by video programming providers not affiliated with the operator doubtlessly will produce significant intra-system competition. The adoption of a rule that requires operators to provide carriage on terms that are just and reasonable and not unreasonably discriminatory is all that is required to assure that such competition will be fair. In adopting this rule, however, the Commission will

[18] Notice ¶¶ 9-27.

undermine the competitive viability of open video systems themselves and the competitive prospects of the video programming providers if it fails to give the greater weight to assuring the competitive viability of open video systems against incumbent cable operators.

Further, the Joint Parties see in the Commission's reference to balancing intra-system and inter-system competition a frightening spectre of video dialtone, namely, an inference that open video systems operators must not only accommodate the selection of programming by multiple video programming providers but also must design and equip their systems expressly to accommodate multiple MVPDs. Neither Section 653 nor the legislative history expresses any congressional intent to ensure that open video systems bear the added costs of accommodating multiple MVPDs. Section 653 merely requires that multiple video programming providers be permitted to "select" video programming for carriage on the system.[19]

Moreover, Congress stated that it did not intend "to limit the number of channels that the carrier and its affiliates may offer to provide directly to

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[19] If Congress had intended to mandate that open video systems function as vehicles for competing MVPDs, it would have used that term, which it has defined and used extensively in Title VI. Section 602(13), which currently is codified as 47 U.S.C. § 522(12). By using the term "video programming providers," Congress instead focused on the sharing of editorial control over the system and allowing independent programmers access to carriage. That Congress was aware of the distinction between video programming providers and MVPDs and that Congress did not inadvertently overlook the possibility of competing MVPDs on open video systems is confirmed by comparing Section 653(c)(2)(B) as enacted with the comparable provision in H.R. 1555: "A video programming affiliate of any common carrier that establishes a video platform under this part, **and any multichannel video programming distributor offering a competing service using such platform** . . . shall be subject to the payment of fees . . . ." H.R. 1555, Section 653(b)(2) (Emphasis added.) Congress knew how to express an intent for open video systems to accommodate competing MVPDs, if it had so intended.

subscribers." [20] These words give open video system operators wide latitude to design programming packages and assign use of channels on the system and clearly indicate that Congress did not intend for the open video system operator to design its system expressly for the purpose of accommodating the needs of multiple MVPDs. Finally, Section 653's permission for operators to "carry on only one channel any video programming service that is offered by more than one video programming provider" supports the conclusion that Congress' primary focus was on making open video systems effective and efficient competitors with incumbent cable operators.

Congress' goal in establishing the open video system option was to bring competition to incumbent cable operators. Unless the open video system itself can be a viable competitor, there will be neither inter-system competition nor intra-system competition. Accordingly, any Commission rules designed to ensure nondiscriminatory carriage should not interfere with Congress' primary goal. As a practical matter, as discussed below, this means open video system operators must have flexibility, within the requirement to avoid unjustly and unreasonably discriminatory terms and conditions, to design viable open video systems.

[20] 1996 Act § 653(b)(1)(B).

1. Administration Of Channel Allocation[21]

The Joint Parties support the Commission's tentative conclusion that open video system operators should be permitted to administer the allocation of channel capacity.[22] Indeed, any other conclusion would be fundamentally inconsistent with Section 653 and patently absurd. Operators should be allowed to employ any reasonable process to make channels available on a reasonably nondiscriminatory basis to other video programming providers.

The Commission's use of the term "channel allocation," and its inquiry into whether it should adopt regulations to govern channel allocation and the enrollment process is too reminiscent of video dialtone. Section 653 does not use these terms or reflect these concepts. It merely requires that the Commission prohibit "an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system." [23] The Commission should adopt a rule to that effect and no more. Operators should be given the flexibility to sign up video programming providers in any manner consistent with the nondiscrimination obligation, including determining the appropriate means for informing potential video programming providers of their establishment of open video systems.

Any attempt by the Commission to prescribe detailed allocation, enrollment, or notification rules would be counter-productive and would defeat

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[21] Notice ¶¶ 11-14, 24.

[22] Id. ¶ 11.

[23] 1996 Act § 653(b)(1)(A).

the intent of Congress to provide operators the flexibility to tailor their systems "to meet the unique competitive and consumer needs of individual markets." [24] The Commission should confine its inquiries into the reasonableness of specific practices affecting video programming providers to the dispute resolution process.

2. Operator Discretion Regarding Programming[25]

The Commission can and should permit operators to refuse carriage to operators of cable systems in the open video system's service area. In view of Congress' intent that open video systems "introduce vigorous competition in entertainment and information markets",[26] the Commission should presume conclusively that such refusals are reasonable. Otherwise, incumbent cable operators will be able to interfere with the successful operation of competing open video systems.

One of the Joint Parties, BellSouth, has direct experience with such interference. The incumbent cable operator in BellSouth's video dialtone trial area requested half of the system's analog channels and a substantial number of digital channels. Even though that operator was allocated a smaller number of analog channels, its presence as an enrolled programmer during preparation for the trial has greatly increased the difficulty of creating and maintaining a coalition of enrolled programmers for development of a competitive retail

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[24] Conference Report at 177.

[25] Notice ¶ 15.

[26] Conference Report at 178.

offering. Moreover, its participation has greatly complicated the provision of competitively sensitive, but essential, information to other enrolled programmers.

3. Capacity Measurement[27]

The Notice correctly observes that "measuring the 'capacity' of an open video system may not be entirely clear in all cases." [28] The advent and continuing development of digital technologies make it impossible to prescribe a specific way to measure digital capacity that will be appropriate for all systems. The suggestion that capacity be measured "based solely on the system's total bandwidth" is contrary to Section 653(b)(1)(B), which refers to "channel capacity," "activated channel capacity," and "number of channels". The Commission should simply adopt the rule required by Section 653(b)(1)(B) without elaboration. Operators will be required to determine how to comply based on the characteristics of their systems. If those determinations are challenged, the Commission should approve any approach that reasonably reflects the technical characteristics of the system.

The Commission's tentative conclusion that the capacity of switched digital systems can be presumed to be unlimited is a good working hypothesis, but it must be tempered by a recognition that infinite expansion of such systems may not be economically reasonable or technologically feasible.[29] In any event,

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[27] Notice ¶¶ 16-19.

[28] Id. ¶ 17.

[29] Id. ¶ 18.

there is too much potential for variation among switched digital systems for the Commission to adopt specific rules for the measurement of such capacity.

While the Notice correctly reaches the tentative conclusion that PEG channels and "must-carry" channels[30] should not be counted as part of the operator's one-third,[31] it incorrectly proposes to deduct those channels from the total prior to calculating the operator's one-third. This approach violates Section 653, which unambiguously bases the operator's one-third on "the activated channel capacity." Title VI defines "activated channels" as "those channels engineered at the head end of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, **including any channel designated for public, educational, or governmental use**." [32] Although this definition is expressed in terms of cable systems, there is no reason to believe that Congress intended any different meaning for open video systems. Section 653 does not authorize the Commission to deduct any activated channels for

[30] For this purpose, "must-carry" channels should include all channels eligible for mandatory carriage, even if the broadcasters elect retransmission consent instead. Likewise, any channels that are shared should not be counted in the operator's one-third.

[31] Notice ¶ 19.

[32] 47 U.S.C. § 602(1) (Emphasis added).

purposes of calculating the operator's one-third.[33]

4. Minimum/Maximum Capacity Limits[34]

Congress intended that open video system operators be restricted to selecting the programming on no less than one-third of the activated channels if demand exceeds capacity. Nothing in the 1996 Act, however, can be interpreted to restrict the open video system operator to one-third of the capacity if demand is insufficient to fill existing or anticipated capacity.

In addition, no individual unaffiliated video programming provider should be allowed to select the programming on more channels than the open video system operator and its affiliates. For example, where the open video system operator and only one unaffiliated video programming provider seek carriage, the open video system operator should be restricted to control of the programming on no fewer channels than the unaffiliated video programming provider.

5. Analog/Digital Channel Allocation[35]

The absolute necessity of competing effectively against incumbent cable operators demands that open video system operators be permitted to assign programming to analog or digital channels as they deem necessary to provide

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[33] For example, if a system had 300 activated channels and a requirement for 30 PEG, must-carry, and shared channels, the operator could select programming on at least 100 channels, and 170 would be available for the selection of programming by other video programming providers.

[34] Notice ¶ 20.

[35] Id. ¶ 21.